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Attention: Robert P. Hrabinsky

Dear Sirs:

AN APPEAL BY ALLAN W. CROSS (DBA ROYAL COLUMBIAN POULTRY) FROM AN ORDER, AS COMMUNICATED IN LETTERS DATED FEBRUARY 27 AND 28, 2003, OF THE BC BROILER HATCHING EGG COMMISSION CONCERNING PAYMENT FOR BROILER BREEDER CHICKS

Introduction

By letter dated March 1, 2003, Allan Cross dba Royal Columbian Poultry (“RCP”) appealed a February 27, 2003 decision of the British Columbia Broiler Hatching Egg Commission (the “Commission”) to the British Columbia Marketing Board (the “BCMB”). In his appeal, Mr. Cross took issue with the Commission’s decision to undertake to pay Western Hatchery Ltd. (“Western”) for and on behalf of RCP, the sum of \$58,359.40 on account of an unpaid chick shipment.

Background

Mr. Cross, operating as RCP, holds quota as a broiler hatching egg producer in British Columbia. He is regulated under the *British Columbia Broiler Hatching Egg Scheme*, B.C. Reg. 432/88 (the “Scheme”).

Hatcheries supply broiler breeder chicks (“breeder chicks”) to broiler hatching egg producers such as RCP. The producer raises the breeder chicks into hens that lay broiler hatching eggs (eggs from which chickens are hatched and grown for eating). At approximately 62 weeks of age, breeder hen flocks are replaced.

The hatching egg producer sells his eggs back to the hatcheries at a price set by the Commission. The hatcheries hatch these eggs into broiler chicks, and sell them to registered chicken growers to produce the province's chicken supply, as regulated by the *British Columbia Chicken Marketing Scheme*, B.C. Reg. 188/61 (the "Chicken Scheme").

In December 2002, RCP was unhappy with the quality of the breeder chicks received from Western. After some negotiation, Western and RCP came to a settlement whereby Western reduced its breeder chick bill by approximately one third. At this same time, RCP requested that the Commission develop and enforce minimum standards for breeder chicks. RCP's fundamental concern is that, without proper minimum standards for the breeder chicks it receives from the hatchery, it can be required to pay full price for a sub-standard flock. It then suffers adverse consequences from poor egg production and inferior egg quality when it sells hatching eggs back to the hatcheries (who do set standards in their payment for broiler hatching eggs).

In this context, RCP received its next chick placement on January 3, 2003. Again it complained of receiving under-sized chicks. It contacted Western and the Commission, and advised them of its concerns.

This appeal arises because, instead of hearing from Western in response to his concerns, Mr. Cross was contacted by the Commission, who stepped in and paid Western the full amount of the chick order (\$58,359.40). In turn, the Commission advised Western to remit the full amount of all its purchases of broiler hatching eggs from RCP to the Commission until the sum of \$58,359.40 was recouped.

Mr. Cross takes issue with the Commission's actions. He argues that by paying Western directly for what he considers unsatisfactory product, the Commission eliminated any recourse that RCP may have had against its hatchery.

Issues

Mr. Cross has identified the following issues:

1. Does the Commission have the authority to issue the February 27, 2003 letter, paying Western on behalf of RCP and directing Western to remit payment for RCP's hatching egg production to the Commission?
2. In the absence of quality standards, under what authority can the Commission compel producers to accept and pay for sub-standard breeder chicks?

The parties were agreeable to having the first issue addressed by written submissions. In coming to this decision, the Panel has reviewed the following submissions:

- a) March 1, 2003 Notice of Appeal of Mr. Cross;
- b) April 24, 2003 letter of instruction from Jim Collins, Manager, Dispute Resolution Services for the BCMB;
- c) May 16, 2003 submission from the Commission; and
- d) July 2003 submission with attachments from Mr. Cross.

Decision

The first issue as we see it is whether the *Scheme* gives the Commission the power to pay a hatchery for an unpaid producer account.

In our view, the Commission does have this power. The Commission has the express power to set and collect levies, charges and other fees from industry participants, which monies it can spend “to carry out the purposes of the scheme”: see *Natural Products Marketing(BC) Act*, R.S.B.C. 1996, c. 330 (the “*Act*”), s. 11(1)(o)(i), and *Scheme*, s. 8(1)(a). In our view, this authority extends to paying a hatchery for a debt that a producer is unwilling or unable to pay a hatchery for product it receives.

To understand the importance of this power, it is necessary to understand the regulatory context in which the Commission operates. The hatching egg industry and the chicken industry are closely linked. The ability of chicken growers to grow their quota under the *Chicken Scheme* is vital to the livelihood of those growers and all actors within that industry. The necessity for all allotted chicken quota to be grown is also essential for British Columbia as a whole to avoid penalties under the Federal-Provincial Agreement for Chicken. To meet these provincial and national objectives, and similar objectives under the Federal-Provincial Agreement for Broiler Hatching Eggs, significant integrated pre-planning is necessary by the Commission, as reflected in the Commission’s Official Flock Schedule.

The Official Flock Schedule ensures that sufficient broiler hatching eggs are produced to satisfy British Columbia’s broiler quota allocation. Hatcheries are to order and arrange for the placement of breeder chicks (or pullets) in accordance with the Official Flock Schedule. Hatcheries may also inform the Commission in writing as to their preferred strain or source of breeder chicks to be ordered and placed. Where a hatchery does not order and arrange for the placement of flocks, the BC Egg Hatchery Association will order and arrange flock placement. Where a hatchery does not inform the Commission in writing of its preferred strain, or where it is not practicable for the Commission to order and arrange placement of the strain requested, the Commission may order and arrange for placement of broiler breeders of any strain or from any source it deems practicable (see the Commission’s General Orders, Part V – Flock Placement).

Just as the Commission can use its powers to order and arrange for placement of broiler breeders in order to ensure that hatching egg production is not interrupted, it has the authority to use those powers to ensure that a payment dispute between a producer and a hatchery does not interrupt production. Clearly, in our view, it is within the purposes of the *Scheme* for the Commission to exercise its discretion to use levies to pay a hatchery for a flock it has placed with a producer who has not paid for that flock. This is one aspect of the general power in s. 8 of the *Scheme* that gives the Commission not only the broad regulatory powers to “promote, regulate and control *in any and all respects*, the *production*, transportation, packing storing and *marketing*, or any of them, *of a regulated product*” (emphasis added), but also “all powers necessary or useful in the exercise of those powers”.

Having used its levies to pay Western for the flock it placed with RCP, the next question is whether the Commission had the authority to order Western to remit to the Commission monies payable to RCP for the broiler eggs that RCP marketed to Western. The question, in short, is whether, after paying Western itself, the Commission had the authority to order Western to engage in a form of garnishment in respect of monies payable by Western to RCP.

Subject to the qualification below, we think that the Commission does have this power. As described in s. 11(1)(v) of the *Act* and s. 8(1)(a) of the *Scheme*, the Commission has the power to:

- (v) require a person who receives a regulated product for marketing from a producer to deduct from the money payable by the person to the producer licence fees, levies or charges payable by the producer to the marketing board or commission and to remit them to the marketing board or commission.

While this power – flowing from the Commission’s power to set the price of broiler breeder chicks¹ – expressly allows the Commission to effectively “garnish” from a hatchery funds that were otherwise payable to a producer, the garnishment must be for charges that *are* otherwise payable by the producer to the Commission.

Given the serious and intrusive nature of this power in respect of business relationships between producers and hatcheries, it is our view that, as a matter of sound marketing policy, the Commission should not exercise it – and in particular should make no finding that charges are payable by a producer to the Commission – until after a producer has been given an opportunity to be heard as to whether or to what extent the Commission ought to exercise the power of garnishment.

This is basic procedural fairness, and in this case, such fairness has a valid purpose. If a producer was able to convincingly demonstrate to the Commission that the chicks received were truly defective and sub-standard and resulted in demonstrable harm to the producer, the Commission might well properly decide not to claim full garnishment despite its earlier payment to the hatchery. On the other hand, if a producer was unable to make a case for his failure to pay the hatchery, the Commission could then give the producer a reasoned decision setting the charges that are “payable by the producer to the (Commission)”. The procedural fairness process would also allow for the hatchery’s transparent participation, and provide a further opportunity for the producer and hatchery to resolve matters without formal regulatory action. Knowledge that such a process is necessary may also put the Commission in a better position to consider the approach to take, in light of the Official Flock Schedule and its duty of fairness, regarding the urgency of paying the hatchery prior to considering the quality standards complaint.

We therefore answer the first question described above by stating that, when it acts for valid industry purposes, the Commission has the discretion to pay a hatchery for product the hatchery has placed with a producer, but that the Commission can only exercise its “garnishment” power after giving the producer notice and an opportunity to be heard regarding whether there is a charge payable to the Commission.

¹ “Regulated product” under the *Scheme* is defined to include not just a broiler hatching egg or a saleable chick but a broiler breeder as well. “Broiler breeder” is defined as a *chick* or chicken raised or used for the production of broiler hatching eggs.

Having answered the first question as described above, the second question RCP has raised on this appeal is this:

In the absence of quality standards, under what authority can the Commission compel producers to accept and pay for sub-standard breeder chicks?

Implicit in this second question is the factual assertion that RCP received sub-standard breeder chicks. On this issue, Mr. Cross's objection is that he is required to take breeder chicks from his hatchery with little recourse for what he sees as poor quality. His argument is that when he in turn produces broiler hatching eggs from what he sees as inferior breeders, he must meet very specific quality standards set by the hatchery. He asks, as a matter of common sense and fairness, why he must meet quality standards set by the hatchery when his hatchery supplier does not have to meet the same obligation?

Given the nature of Mr. Cross's objection, we are reluctant to embark on a full hearing at this time on the factual and policy question regarding whether or not his flock is sub-standard, when the Commission itself did not undertake the procedural process we described above. We do not have a reasoned decision from the Commission, informed by the views of RCP, Western and the Commission's own special knowledge, on the standard of RCP's flock, either in relation to industry standards generally, or relative to the flocks received by other producers at the same time. While counsel states that "there is no evidence to suggest that there is any correlation between breeder chick size and progeny quality", we think that instead of making this sort of broad generalization (which clearly breaks down at a certain point), the more appropriate approach for the Commission in this case is to actually investigate RCP's complaint in relation to how Mr. Cross's flocks have produced in historical terms, or relative to other producers who received flocks in the same time period. The Commission will have access to actual data to inform these concerns, as the flock has been and continues to be in production. We would expect that these issues would be properly reviewed and assessed by the Commission in the context of providing RCP with a reasoned view in response to its concerns.

At the same time, the Commission could helpfully use the review of Mr. Cross's case as an opportunity to give careful consideration to the more general question of quality standards for broiler breeder chicks, something it has express authority to do under section 11(1)(b) of the *Act*. The creation of appropriate quality standards will have several advantages. These include creating a set of clear and realistic expectations on the part of both hatcheries and producers, helping to ensure minimal disruption of the Official Flock Schedule by preventing these sorts of disputes from becoming more common, and allowing the Commission to resolve disputes regarding chick quality at the "front end" rather than having to follow the process required here.

As the Commission is aware, and as Mr. Collins referred to in his April 24, 2003 letter, the subject of quality standards for broilers has been before the BCMB a number of times in the past year. In those cases, the issue was returned to the Chicken Board with directions to consult and put appropriate standards in place in a timely fashion. Given the related nature of their industries, the Commission was included in these directions.

Order

Having answered the preliminary question arising on this appeal, we have concluded that, in all the circumstances, the subject matter of this appeal should be referred back to the Commission for a proper finding, informed by a proper process, as to whether some or all of the breeder chick flock Western sold to RCP was sub-standard so as to relieve it from some or all of the obligation to repay the Commission by way of garnishment under s. 11(1)(v) of the *Act*.

We therefore order, under s. 8(9)(b) of the *Act*, that the question whether RCP's funds should have been garnished from Western be referred back to the Commission, with the following directions:

1. That the Commission embark on a full reconsideration of the question, informed by a fair process that gives RCP and Western an opportunity to be heard.
2. That the Commission conduct its process and give the parties a reasoned decision on this question within ninety (90) days from the date of this decision.
3. That if the Commission concludes that some or all of RCP's allegations are valid, the Commission remit some or all of the previously garnished levies to RCP's account.
4. Alternatively, if the Commission concludes that RCP's allegations are not valid, that the Commission retain all the garnished levies.
5. That if RCP is dissatisfied with the Commission's decision pursuant to this direction, RCP may initiate a new appeal to the BCMB.

We have considered whether, pending such reconsideration, the Commission should be required to repay RCP for funds already garnished from Western. We answer this question no, for several reasons, including the undue complication this would create, and the need to ensure RCP's full cooperation with the Commission in carrying out these directions.

To these directions, we repeat our strong encouragement to the Commission to commence a more general review and industry-wide consultation on the issue of quality standards. The Commission can expect the BCMB, in its supervisory capacity, to continue to take up this issue with the Commission. As of the date the Commission responds to Mr. Cross's case (see direction #2 above), the BCMB also expects to receive a letter from the Commission outlining its plan for a more general industry review of quality standards.

Right of Appeal

If a person, marketing board or commission is aggrieved or dissatisfied by an order or referral of the BCMB under section 9(1) of the *Act*, the person, marketing board or commission may appeal the order or referral on a question of law to the Supreme Court if the appeal is commenced within 30 days of being served with a copy of the order or referral.

BRITISH COLUMBIA MARKETING BOARD

Per

(Original signed by):

Christine J. Elsaesser
Vice-Chair

cc: Dave Cherniwchan, General Manager
British Columbia Broiler Hatching Egg Commission